

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1942

No. 8152

910

LILLIAN L. MOSES, *Appellant*

v.

John P. Labofish

~~COLMAN BREZ STEIN~~, Trustee in Bankruptcy of JOHN THEODORE KIDWELL, trading as KIDWELL AUTO BODY COMPANY, Bankrupt, BANKRUPTCY NO. 4097—DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA, *Appellee*

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

GERALD M. JOHNSON

Attorney for Appellant,

Lillian L. Moses

1427 Eye Street, N. W.
Washington, D. C.

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JANUARY TERM, 1942.

No. 8152.

LILLIAN L. MOSES, *Appellant*

v.

COLMAN BREZ STEIN, Trustee in Bankruptcy of JOHN
THEODORE KIDWELL, trading as KIDWELL AUTO
BODY COMPANY, Bankrupt, BANKRUPTCY NO.
4097—DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA, *Appellee*

BRIEF AND APPENDIX FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from an Order of the District Court of the United States for the District of Columbia (App. 8) denying a motion to review a Ruling of the Referee in Bankruptcy and affirming the Order of the Referee in Bankruptcy (App. 8) on a Petition by Lillian L. Moses, requesting a Discharge of her Landlord's Lien given her by

Section 1229 of the Code of the District of Columbia, as enacted March 3, 1901, (31 Stat. L., pt. 1, pp. 1189 *et seq.* s. 1229) (Title 25, Sec. 325, The Code of the District of Columbia), from funds in the hands of Colman Brez Stein, Trustee in Bankruptcy. The jurisdiction of the lower court is supported by Chapter II, Sec. 2 of the Act of Congress, approved July 1, 1898 entitled "An Act to establish a uniform system of bankruptcy throughout the United States and Acts amendatory thereof and supplementary, thereto, etc." (30 Stat. 544 ch. 541) (U. S. C. A. Title 11, Sec. 11). This court has jurisdiction upon appeal by virtue of Secs. 24 and 25, of the Act of Congress, approved June 22, 1938 (52 Stat. 854-855) (U. S. C. A. Title 11, Sections 47c and 48a-3), the amount involved in the order appealed from being not less than \$500.

Statement of Case.

This case was first tried before the Referee in Bankruptcy on a petition of Lillian L. Moses, for Discharge of her Landlord's Lien from the net proceeds of sales of certain personal chattels of the bankrupt, subject to execution for debt, held by Colman Brez Stein, Trustee in Bankruptcy of John Theodore Kidwell, amounting to \$534.84 (App. 5). Kidwell had been the tenant of said Lillian L. Moses, and the chattels involved had been taken from the United States Marshal for the District of Columbia, who had seized them under a *fiery facias* issued in execution of a judgment by the Municipal Court of the District of Columbia, for rent due said Lillian L. Moses. At the time of the institution of the action for rent the said chattels were on the rented premises; but were removed therefrom before the date of the judgment, but after the institution of

the action brought for rent, under an appropriate provision of Section 1230 of the Code of Law for the District of Columbia, as enacted March 3, 1901, (31 Stat. L. pt. 1, pp. 1189 *et seq.* s. 1230) (Title 25, Sec. 326, The Code of the District of Columbia), providing for the enforcement of her landlord's lien, given her under Section 1229 of said Code.

The Referee ruled that the lien given her by said Sec. 1229, was unaffected by the subsequent bankruptcy of said Kidwell, but was lost by the removal of said chattels by said Kidwell from the rented premises, between the time of the institution of the proceedings to enforce the landlord's lien and the judgment of the Municipal Court, aforesaid, against Kidwell for arrears of rent due said Lillian L. Moses, and that when the judgment was rendered, the lien having been lost by removal of the goods from the rented premises, the subsequent levy on the chattels not on the premises (although they had formerly been on the rented premises) created a lien only by virtue of the levy and consequently being a lien by "legal proceedings" it was nullified by virtue of the provisions of Section 67, Par. (a) (1) of the Bankruptcy Act, (U. S. C. A. Title 11, sec. 107f), aforesaid.

Statement of Points.

1. The landlord's lien given by said Sec. 1229 of the Code of Law for the District of Columbia is a statutory lien or security and attaches to the tenant's personal chattels, on the rented premises, as are subject to execution for debt, commencing with the tenancy and continuing to attach for a specified time named in the statute creating the lien and the said time specified can not be shortened

by the removal by the tenant of his personal chattels from the rented premises, if the identity of the goods is not lost.

2. The words "on the premises" used in Section 1229, aforesaid, identifies the chattels to which the lien attaches and do not mean "while on the premises" and so long as the original identity of the chattels can be proved, the lien thereon is not lost, by the mere removal of said chattels to a new location, within the District of Columbia, at least.

3. The landlord has his choice of any of three ways specified in Section 1230 of the said Code, for enforcing his landlord's lien, that may be applicable to the circumstances of the existing situation in a case.

4. Attachment, judgment and execution are each legal proceedings directed by said Section 1230 of said Code, for the enforcement of a landlord's lien; but when used as directed in said Section 1230 of said Code, do not create a landlord's lien, but are the means directed by law for the enforcement of a previously created and existing lien.

5. The landlord's lien given by said Section 1229, is not one obtained through "legal proceedings," within the meaning of the anti-preference provisions of the Bankruptcy Act of June 22, 1938 effective from and after September 22, 1938, and is not affected by the subsequent bankruptcy of the tenant.

Summary of Argument.

The facts in this case are not in dispute (App. 1-8). The law is specific and definite. The whole case, is whether the

landlord's lien in the District of Columbia is a security to the landlord for his rents accrued, within the limits stated in the law or whether the tenant can by his own act defeat the lien after it has attached. And does the lien exist independent of and before the exercise of the means prescribed by statute for enforcing it.

"Landlord's tacit lien on tenant's furniture for rent due exists independently of statutory methods for enforcing it and property subject thereto comes into possession of equity court or its officers subject to such lien."

Bryan v. Sanderson, 3 MacArthur (10 D. C.) 431.

Argument.

The law of the District of Columbia upon the subjects involved in this case is found in Sections 1229 and 1230 of the Code of Law of the District of Columbia, aforesaid and Section 67-a(1) of Chapter VII of the Bankrupt Act, approved June 22, 1938 (U. S. C. A. Title 11, sec. 107f), and it is as follows:

"Sec. 1229. Lien for Rent. The landlord shall have a tacit lien for his rent upon such of the tenant's personal chattels, on the premises, as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due and until the termination of any action for such rent brought within said three months."

"Sec. 1230. How enforced. The said lien may be enforced—

First. By attachment, to be issued upon affidavit that the rent is due and unpaid; or, if it be not due, that the defendant is about to remove or sell some part of said chattels.

Second. By judgment against the tenant and execution, to be levied on said chattels, or any of them, in whosoever hands they may be found.

Third. By action against any purchaser of said chattels, with notice of the lien, in which action the plaintiff

may have judgment for the value of the chattels purchased by the defendant not exceeding the rent in arrear."

"Sec. 67. (U. S. C. A. Title 11, sec. 107f):

"Liens and Fraudulent Transfers.—a (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act: Provided, however, That if such person is not finally adjudged a bankrupt in any proceedings under this Act and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided."

I. Lillian L. Moses acquired a statutory landlord's lien on the personal property of the bankrupt that was on the rented premises at the time of the commencement of her action for rent due in arrears.

Sec. 1229 of the Code of Law for the District of Columbia, enacted March 3, 1901, 31 Stat. L. pt. 1, pp. 1189 *et seq.*, s. 1229; Title 25, Sec. 325, The Code of the D. C. (1929).

Wallace v. Chesley, 2 Mackey (D. C.) 209.

Gibson v. Gautier, 1 Mackey (D. C.) 35.

Morgan v. Campbell, Assignee, 22 Wallace 381, 22 L. Ed. 796.

Fowler v. Rapley, 82 U. S. (15 Wal.) 328, 21 L. Ed. 35.

(A) The action for rent brought by the landlord, Moses, was commenced within the period authorized by the Second Provision of Section 1230 of the Code, afore-

said, and the judgment and execution that followed were also part of the means for enforcing her said landlord's lien, prescribed by the second provision of Section 1230 of the Code aforesaid, for enforcing her lien given by Sec. 1229, aforesaid.

Section 1230—Code of Law for the District of Columbia.

Morgan v. Campbell, Assignee, 22 Wallace 381, *supra*.

Wallace v. Chesley, 2 Mackey (D. C.) 209.

(B) The landlord, Moses, had her choice of any of three ways specified in Section 1230 of the Code, aforesaid for enforcing her landlord's lien and used the one most appropriate to the circumstances of her case.

Section 1230—Code of Law for the D. C., *supra*.

Wallace v. Chesley, 2 Mackey (D. C.) 209.

(C) Her landlord's lien was not lost, because she did not adopt the First Provision of said Section 1230 for the enforcement of her lien, while the chattels were on the rented premises and it was impossible for her to adopt the Third Provision of said Section 1230 for the enforcement of her lien, because there had been no sale of the seized chattels by the bankrupt.

Section 1230—Code of Law, D. C., *supra*.

Wallace v. Chesley, *supra*.

Holdane v. Sumner, 82 U. S. (15 Wall.) 600, 21 L. Ed. 254.

II. The words "on the premises" used in said Section 1229, identify the chattels to which the landlord's lien attaches, excluding chattels that have never been brought upon the rented premises, although the property of the defaulting tenant and subject to execution for debt; but does not mean "while on the premises" and so long as the original identity

of the chattels can be proved, the lien thereon is not lost to the landlord, by the mere removal, by the tenant, of the chattels to a new location within the District of Columbia, after the landlord's lien has attached thereto, by virtue of the statute.

Section 1230 of the Code, *supra* (Second and Third Provisions).

Wallace v. Chesley, *supra*.

Gibson v. Gautier, *supra*.

Morgan v. Campbell, Assignee, *supra*.

Holdane v. Sumner, *supra*.

Grant v. Whitwell, Marsh & Talbert, 9 Iowa Reps. 152.

Fowler v. Rapley, *supra*.

Jenkins v. Calvert, 3 Cranch C. C. (3 D. C.) 216;
Fed. Case No. 7,263.

In Wallace v. Chesley, *supra*, the Court said:

* * * "the affidavit further shows that the chattels had been already removed from the premises" * * *
"But it will occur to anybody, that the tenant may, just before the maturity of his rent, and in order to avoid compulsory payment of it, remove his chattels or change the property in them. To meet that contingency it is further provided" * * * "as we all know, that a lien may also be enforced by the landlord by obtaining a judgment against the tenant and issuing an execution which can be levied on the goods in whosoever hands they may be found; and the landlord is also authorized to sue the purchaser and get judgment against him to the extent of the rent in arrears."

In Jenkins v. Calvert, 3 Cranch (D. C.) 216, *supra*, the Court said:

"Goods fraudulently removed by the tenant, although not secretly or clandestinely, may be followed and distrained by the landlord" * * * "The tenant's removal of his goods before the expiration of the term,

without the knowledge of the landlord, and without paying the rent, is a fact from which the jury may infer that the removal was fraudulent as to the landlord."

(A) "Where, under a Code the landlord has a lien for rent upon chattels of his tenant, the lien is not lost by the conversion of the property into money by a receiver appointed by the Court, but attaches to the funds in his hands."

Gilbert v. Greenbaum, 56 Iowa 211; 9 N. W. 182.

Longstreet v. Pennock, 87 U. S. (20 Wall.) 575-576.
22 L. Ed. 451.

III. Attachment, judgment and execution are each "legal proceedings" directed by said Section 1230 of said Code for the enforcement of a landlord's lien; but when used as directed in said Section 1230 of said Code do not create a landlord's lien, but are the means directed by the statute for the enforcement of a previously created and existing lien.

Section 1230 of the Code of Law for the D. C.,
supra.

Morgan v. Campbell, 22 Wallace 381, *supra*.

Bryan v. Saunderson, 3 MacArthur (10 D. C.) 431
supra.

IV. The landlord's lien given by said Section 1229 of the said Code, is not one obtained through "legal proceedings," within the meaning of the anti-preference provisions of the Bankruptcy Act of June 22, 1938, effective from and after September 22, 1938 and is not affected by the subsequent bankruptcy of the tenant.

Henderson, Trustee in Bankruptcy v. Mayer, 225
U. S. 631, 56 L. Ed. 1233, 32 Sup. Ct. R. 699.

Morgan v. Campbell, Assignee, 22 Wallace 381,
supra.

In re: Edmunds, 27 F. Supp. 196.

In re: C. J. Rowe & Bros. Inc., 18 Fed. (2nd) 660.

The Supreme Court of the United States in *Morgan v. Campbell, Assignee, supra*, in construing a landlord's lien in the State of Illinois, said:

"* * * The statute does in express terms confer a lien upon the crops growing or grown upon the demised premises in any year for the rent for that year, and recognizes for other personal property in the county the right of distress as it existed at common law."

* * * * *

"A statutory lien implies security upon the thing before the warrant to seize it is levied. It ties itself to the property from the time it attaches to it and the levy and sale of the property are only the means of enforcing it. In other words, if the lien is given by statute, proceedings are not necessary to fix the status of the property. But in the absence of this statutory lien it is necessary to take proceedings to acquire a lien on the property of the tenant for the benefit of the landlord."

* * * * *

"The object of the law was evidently to prevent anyone procuring a lien after the filing of the petition who had not got it before. If the lien existed before the filing of the petition, it could be enforced in the bankruptcy court; but if it did not exist the purpose of the law was to prevent its being brought into existence by any proceedings whatever."

Conclusion.

The theory upon which the lower Court refused to overrule the Referee in Bankruptcy was that the claimed landlord's lien was obtained by a judgment rendered within four months of the bankruptcy and after the chattels had been removed from the rented premises. At the same time the lower Court conceded that had the plaintiff proceeded under the First Provision of said Section 1230 and attached the chattels while they were on the rented premises the

landlord's lien would not have been affected by the bankruptcy even though the attachment was made within four months of the bankruptcy.

The lower Court failed to comprehend that the landlord's lien was not "obtained by legal proceedings"; but existed by statute independently of the means provided by law for its enforcement (and therefore used), before the judgment was rendered and while the chattels were on the rented premises.

Respectfully submitted,

GERALD M. JOHNSON,
Attorney for Appellant,
Lillian L. Moses.

BRIEF FOR APPELLEE

United States Court of Appeals for
the District of Columbia

January Term, 1942

No. 8152

LILLIAN L. MOSES,

Appellant

vs.

John P. LaRofish

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APPEAL FROM AN ORDER OF THE DIS-
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COLMAN BREZ STEIN, *Appellee*
806 - 15th Street, N. W.
Washington, D. C.

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BRIEF FOR APPELLEE

Summary of Argument

Appellee takes the position that the landlord's lien in the District of Columbia is waived when the tenant voluntarily vacates the leased premises after the landlord has filed an action for possession of the premises.

Argument

Congress has provided three ways in which the landlord's lien may be enforced: (1) by attachment (2) by judgment and execution (3) by action against a purchaser with notice.

It is apparent that these three means of enforcement were promulgated to take care of the three common situations: (1) where the tenant is in possession of the premises and his rent is in arrears (2) where the tenant has removed the chattels without the consent of the landlord (3) where the tenant has sold the chattels.

In the instant case, the step which appellant should have taken was an attachment at the time she filed her suit for possession of the premises, on the ground that the rent was due and unpaid. Instead of that, appellant filed a suit in the Municipal Court demanding possession of the premises because of failure on the part of tenant to pay rent. By this suit appellant not only *requested* tenant to vacate the premises, but *demand*ed that the Court *order* tenant to vacate the

premises. During the pendency of this suit tenant voluntarily vacated the premises, prior to the time a judgment for possession was entered in favor of appellant. Appellant, in effect, consented to the removal of the chattels from the premises by the tenant and waived her landlord's lien.

While it is true that Section 1230 of the Code (quoted in appellant's brief) permits the enforcement of the lien by judgment against the tenant and execution to be levied on the chattels in whosoever hands they may be found, this provision can be used only where the tenant removed the chattels without the consent of the landlord. The cases discuss "fraudulent removal" or "secret or clandestine removal" by the tenant. It was to prevent such action that Congress gave a landlord the right to proceed by way of judgment and execution. However, where the removal was neither fraudulent, secret nor clandestine, but was made not only with the consent, but at the demand of the landlord, procedure by judgment and execution cannot be pursued.

It is conceded that the landlord's lien given by Section 1229 of the Code (quoted in appellant's brief) is not one obtained through legal proceedings within the meaning of the provisions of the Bankruptcy Act. Here, however, the landlord lost her lien because she consented to and demanded the removal of the chattels by the tenant. The subsequent judgment and execution were not the enforcement of her landlord's lien, but were merely proceedings on a claim for money due (which happened to be rent) which gave appellant only the rights of a general attaching creditor. These rights fall before the provisions of the Bankruptcy Act.

The point which appellant fails to recognize is that when she filed her suit for possession of the premises, she demanded that tenant remove therefrom. When tenant removed voluntarily prior to the date of judgment he was acting in conformity with the demand of appellant and her landlord's lien was lost by this action.

Respectfully submitted,

COLMAN BREZ STEIN, *Appellee*

